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In The
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

PETITIONER,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit
(following remand)

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE*,

SENATOR JOHN S. MCCAIN,
REPRESENTATIVE MICHAEL G. OXLEY,
REPRESENTATIVE JAMES C. GREENWOOD,
REPRESENTATIVE THOMAS J. BLILEY, JR. (RET.),

IN SUPPORT OF PETITIONER

CAROL A. CLANCY
Counsel of Record
BRUCE A. TAYLOR
Co-Counsel for Amici Curiae
NATIONAL LAW CENTER
FOR CHILDREN AND FAMILIES
3819 Plaza Drive
Fairfax, Virginia 22030
(703) 691-4626

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INTEREST OF *AMICI CURIAE*

Amici Curiae are the principal Congressional sponsors of the *Child Online Protection Act* of 1998 ("COPA" or "the Act"). Senator John McCain was Chairman of the Senate Committee on Commerce and Representative Tom Bliley (ret.) was Chairman of the House Committee on Commerce, which authored REPORTS to accompany COPA (H. REPT. No. 105-775 and S. REPT. No. 105-225). Representatives Michael Oxley and James Greenwood were primary sponsors in the House. (Senator Dan Coats (ret.), original sponsor of the Act, was an *amicus* below, but is now an Ambassador of the United States and cannot join in this Brief.) These gentlemen filed BRIEF(S) OF MEMBERS OF CONGRESS AS *AMICI CURIAE* in the District Court, the Third Circuit (twice), and in this Court on first appeal, to present their views on the intent of Congress concerning the meaning and applicability of COPA. Your *amici* submit that the decisions below are contrary to this Court's precedent and the legislative intent of the Congress. These *amici* submit arguments not presented by the parties below and may not otherwise be submitted to this Court.[1]

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record respectively, have granted consent to the filing of this Brief *Amici Curiae* in support of Petitioner. Their letters of consent are on file with the Clerk of the Court.

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record Carol A. Clancy and Co-Counsel Bruce A. Taylor of the National Law Center for Children and Families ("NLC") and no part of the brief was authored by any attorney for a party. No person or entity other than the NLC, *amici curiae*, or their counsel made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

SUMMARY OF ARGUMENT

The *Child Online Protection Act* of 1998 is a facially constitutional, limited statute that narrowly addresses a Congressional and public concern about continued proliferation of the obscene (hard-core) and obscene for minors (soft-core) pornography that is currently being disseminated indiscriminately by commercial pornographers to minors using the World Wide Web. The Congressional REPORTS that accompanied COPA state the legislative basis and intent of the Act. *See* S. REP. No. 105-225 and H.R. REP. No. 105-775. COPA was drafted to conform to the special demands of the medium of the Web and to the traffic in "commercial pornography" (as repeatedly stated in the REPORTS). It differs from "geographic" or "non-specific" approaches to "community standards" that have been approved for judging obscenity in other mediums. COPA created an "*age*" standard, in which what is obscene for the respective under-17 audience; *i*.e., the age group of the probable recipient minors, is measured by the views of the American adult community as a whole. *See* House REPORT at 28. The decision by Congress to adopt a "non-geographic", "age-based", "adult" community standard for judging how to measure the prurience and offensiveness prongs of COPA was proper for the legislative branch.

COPA narrowly and specifically applies channeling obligations only with respect to commercial Web sites: (1) that regularly engage in the business of selling, and (2) then knowingly make available to minors, that type of pornography that meets the *Millerized-Ginsberg*[2] definition in Section 231(e)(6) that is obscene or obscene for minors. As such, this two part burden of proof on the Government,

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[2] *Ginsberg v. New York*, 390 U.S. 629 (1968), *Miller v. California*, 413 U.S. 15 (1973), *et seq*.

like that under 18 U.S.C. § 1466,[3] would require a federal jury and the federal courts to find that an offender of COPA regularly sought profit from dissemination of pornography that was obscene or obscene for minors and then made available specific pornographic material that is obscene for minors under the definition of what is "harmful to minors".

Finally, COPA's requirement that the material be "taken as a whole" meets the Constitutional requirements for how variable obscenity must be judged under *Ginsberg, supra*. While the *material*[4] distributed must be judged as a whole, the *mechanism of distribution* (here, a Website) *is immaterial. Compare United States v. Thomas*, 74 F.3d 701, 707 (6th Cir. 1996) (holding that GIF files fall within the obscenity statutes, though not specifically mentioned, because "the manner in which the images move[ ] does not affect their ability to be viewed on a computer screen in [a distant location] or their ability to be printed out in hard copy in that distant location"), *cert. denied,* 117 S.Ct. 74 (1997). *Accord, United States v. Hockings,* 129 F.3d 1069, 1072 (9th Cir. 1997) ("We conclude that computer GIF files are visual depictions within the meaning of the charging statute. The visual image transported in binary form starts and ends pornographically and that is what Congress seeks to prohibit). Under COPA, in order to establish a variable obscenity crime, the prosecution need not have to prove that the "entire website" be taken as a whole as obscene. The HTM material involved in a particular offense on a Website may factually consist of matter posted on one page, or posted on one hundred pages, depending on how an offender set it

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[3] Congress intended 47 U.S.C. § 231(e)(2) ("commercial purposes; engaged in the business" to parallel 18 U.S.C. § 1466, as stated in S. REP. No. 105-225, at 11, and H.R. REP. No. 105-775, at 27.

[4] "Material" is defined at 47 U.S.C. § 231(e)(6) as any "communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or meets the definition for HTM (obscene for minors).

up. While not constitutionally required, under COPA, evidence relating to the "entire website, in whole or in part" may have relevance to the issues, as providing the context of distribution and as evidence of the obscenity (because of pandering) or non-obscenity (because of the presence of mitigating factors) of material made available.

The Third Circuit has twice evaded its obligation to judicially construe COPA so as to save it and committed clear error by basing its most recent decision to overturn COPA on facts not supported by the record, and by completely disregarding COPA's legislative history. The court made clearly erroneous findings about COPA's actual requirements and relied on factual and legal errors as foundation for the wrongly decided outcome. The Third Circuit incorrectly applied strict scrutiny, analyzing COPA as though it regulated *non-commercial* speech. COPA applies only to *commercial* activities, and involves the dissemination of material not protected in the context in which it is *knowingly* disseminated to minors. However, COPA's requirements are necessary and should survive any level of scrutiny, because only COPA's use of criminal penalties can: (1) effectively deter the described unconscionable *commercial* behavior, (2) adequately protect children from known harm, and (3) prevent misuse of an important channel of federal communication.

Both the District Court and the Court of Appeals have ignored and refused to follow the prior mandate of this Court to properly apply and construe, when necessary, federal statutes in constitutional fashion. *New York v. Ferber*, 458 U.S. 747, 769, n. 24 (1982). Therefore, this Court should authoritatively construe this federal statute forthwith, should reverse the decision of the Court of Appeals which affirmed the judgment of the District Court, vacate the Preliminary Injunction issued as having been improvidently granted, and render instead a narrowing authoritative judicial construction of COPA, consistent with its legislative purpose

and Congressional intent, which furthers the policy of federal statutory construction that courts should give legislation a saving construction in order to avoid constitutional conflict and avoid or prevent unnecessary constitutional questions.

When COPA is so construed, as intended in the House and Senate REPORTs and sponsor statements, all the lower federal courts, as triers of fact and on judicial review, may properly arrive at judgments as to whether certain hard or soft core pornography is "harmful for minors" by applying the viewpoint of the average adult person, applying American adult standards with respect to what is obscene for minors, when taken as a whole, predominantly appeals to a prurient interest in nudity, sex, or excretion with respect to the probable and recipient age group of minors and whether the sexual depictions or descriptions are presented in a patently offensive way with respect to the probable and recipient age group of minors. The final prong is not judged with reference to community standards, but is determined by the more universal judgment of a reasonable person's finding as to whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value for the probable and recipient age group of minors to which it is directed or to whom the distributor knowingly displays the pornography.

ARGUMENT

I. COPA IS FACIALLY CONSTITUTIONAL. THE THIRD CIRCUIT'S INTERPRETATION, INVALIDATING THE ACT, WAS CLEARLY ERRONEOUS.

More than 35 years ago, in the landmark case of *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court recognized that governments have the right to assist parents in protecting minor children from exposure to harmful pornography and also have an independent interest in protecting minors from such harm. The Court articulated

and approved a definition for "material harmful to minors" (HTM) or "variable obscenity", in which the definition of "Obscene For Minors" (OFM) is modified to conform to the characteristics of the actual recipient audience: minor children under age 17.

"Children are our future", it's often said. The healthy development of that future is imperiled by children's exposure to harmful pornography, especially if "permitted" by Society.[5] The brain is an incredibly complex and powerful system. Sophisticated medical diagnostic techniques confirm that images override text for brain dominance and research indicates that a pornographic environment "colonizes" in a viewer's brain, producing structural changes in the brain that are involuntary and can last for years.[6] Neurologists question which of the brain's hemisphere will gain control of shared functions and

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[5] *See Ginsberg*, 390 U.S. at 642, n. 10, quoting Dr. Gaylin of the Columbia Univ. Psychoanalytic Clinic, in 77 Yale L.J., at 592-94:

> "It is in the period of growth [of youth] when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control - it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging."... To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval - another potent influence on the developing ego."

[6] *See* Dr. Judith A. Reisman, *Biologically Arousing Sexual Imagery as Psychopharmacological "Toxic Media" "Harmful to Minors," Overriding Left Hemisphere Cognition, Subverting Informed consent and Free Speech,* (1993, 1996). Grant for the Ontario Human Rights Commission, Ontario, Canada, on "Pornography: Neurochemical Effects on Women...." *See also* Reisman, *Kinsey, Crimes & Consequences,* (1998, 2000, 2003), IME, Louisville, KY, Chapter 8.

dominate overt behavior, in light of the fact every second millions of messages bombard the brain and carry information from the body's senses.[7] Inhibitory transmitters help to shape the neural networks that underlie all behavior and control negative behavioral responses.[8] There is evidence that the inhibitory health function of a minor's nervous system can be critically stressed by pornographic imagery. This is of particular concern, since health statistics indicate that a significant percentage of minors may be highly vulnerable to the toxic effect of pornographic stimuli. Researchers claim that 25 percent of the population of the United States is under age 18, and at least 12 percent of these minors have diagnosable mental illness.[9] Current Department of Justice data indicate that 67 percent of all sex abuse victims are minors, and of these, 34 percent are under age 11, and 14 percent are under age 5.[10] According to an Australian study, exposure to online pornography is a "key factor" in the increase of incidents involving young children committing sexual offenses, including "oral sex and forced intercourse," against other children. [11]

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[7] Roy Pinchot, Ed., THE HUMAN BODY: THE BRAIN 122-123 (Torstar Books, 1984), quoting Neurologist David Galin.

[8] *See* David Gottlieb, "GABAergic Neurons," *Scientific American*, at 82, 88 (January 1989).

[9] The Institute of Medicine, Division of Mental Health and Behavioral Medicine, RESEARCH ON CHILDREN & ADOLESCENTS WITH MENTAL, BEHAVIORAL & DEVELOPMENTAL DISORDERS 1 (National Academy Press, Washington, D.C.: 1989).

[10] *See National Incident-Based Reporting System (NIBRS),* SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS, 2 (July 2000).

[11] Patrick Goodenough, "Online Porn Driving Sexually Aggressive Children," Nov. 26, 2003, *CNS News.com*, available at http://www.cnsnews.com/ViewForeignBureaus.asp?Page=/ForeignBureaus/archive/200311/FOR20031126a.html.

If children are raised on a steady mental diet of adult pornography that is Obscene For Minors, their lives will evidence the negative effect of harms that this Court has recognized from commercial pornography. As noted in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973):

> The sum of experience ... affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

In order to protect children from a major source of this harm, *COPA* restricts only commercial pornsites on the World Wide Web (the Web)[12] from indiscriminately, yet knowingly, disseminating HTM-porn to minors, and requires that a commercial Website that sells HTM-porn refrain from knowingly making pornography available to minors, yet protects pornsites that try to verify "adult status" through use of credit cards, adult access codes, adult PIN numbers, or other technologies that are either currently available or developed in the future. In enacting COPA, Congress studied and closely relied upon *Ginsberg* and other precedents in this important area of public concern.

Under established case law, the act of knowingly disseminating to minors pornography that is HTM-OFM is

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[12] Unlike the Communications Decency Act of 1996 and 2003 (CDA), COPA only applies to commercial WWW sites and does not apply to other "interactive computer services," such as non-Web based Internet, Usenet, email, BBS, chat, or other online services. By 1998, the Web was a rapidly growing system to which one could connect *via* the Internet or directly by phone line, but it must be remembered that these online systems and networks are <u>not</u> the same and COPA only applies to sites on the WWWeb, a fact often overlooked by the courts below. *See* Senate REPORT at 2 and House REPORT at 12. *See also* Preston Gralla, *How The Internet Works, Millennium Ed.*, 127 (QUE, Indianapolis, 1999).

not protected by the First Amendment. Congress enacted COPA with specific recognition of this Court's mandate that the application of obscenity-related tests for separating pornography that may be regulated from protected speech depends on the medium. *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978).

Recognizing the unique nature of the medium (*i.e.* display and dissemination of harmful pornography on the commercial Web) and balancing actual harm to minors being perpetrated by current commercial business practices, the Congressional intent expressed in its REPORT of the House Committee on Commerce, H. REPT. No. 105-775, at 28, was that COPA was to be adapted to the Web by using a medium-specific standard of what the American adult-age community as a whole would find prurient and offensive for minors of the recipient age group. Specific facts concerning the circumstances of production, site design, marketing, search engine magnet headers and meta tags, and evidence of "pandering" to targeted audiences should be considered in context on a case-by-case basis to show who may be included in an intended and probable recipient group.[13]

The Third Circuit again refused to adopt a Congressionally intended customization of the "harmful to minors" test and then erroneously interpreted the Act in an unconstitutional way. *ACLU v. Ashcroft*, 322 F.3d 251, 255, 268 (3d Cir. 2003). Both the Court of Appeals and the District Court failed to properly construe this federal statute so as to save it for valid application within constitutional boundaries. The lower courts failed to follow the mandate of this Court to properly apply and construe, when necessary, federal statutes in a constitutional fashion. *New York v.*

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[13] Evidence of "pandering" is relevant, as a matter of First Amendment obscenity law, in establishing all three prongs of the HTM test in COPA. *Ginzburg v. United States*, 383 U.S. 463, 470 (1966); *Hamling v. United States*, 418 U.S. 87, 130 (1974), *Splawn v. California*, 431 U.S. 595, 598-99 (1977)

Ferber, 458 U.S. 747, 769, n. 24 (1982), *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 122, n.7 (1973), *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971).

The Court of Appeals' instant refusal, 322 F.3d at 252-55, to narrowly construe COPA's definition of "Harmful To Minors" was especially egregious. The Act is capable of authoritative construction within a constitutionally valid scope, as specifically invited and intended by Congress, as a limitation on the test for what is "Obscene For Minors" to a non-geographic "adult" *age* community standard, rather than a territorial *geographic* community standard. This error warrants reversal and correction by this Court, which should enter the judgment that should have been entered below.

There are many essential considerations, involving statutory construction, legislative history, First Amendment jurisprudence, and the separation of powers, which the courts below failed to follow, including:

(A) the severity of the *known problem* with respect to the indiscriminate dissemination by commercial vendors of Web pornography of "free porn" and free porn "teasers" which are freely made available to minors, as well as adults;

(B) the express articulation of Congressional concern for protecting both minors *and* the rights and duties of adults in the dissemination and receipt of *commercial* products using federal channels of communication and Interstate Commerce; and

(C) the clear explication by Congress in the Senate and House REPORTS of the limitations on the manner in which COPA can be applied.

On remand from this Court, the Court of Appeals in affirming the District Court's grant of a preliminary injunction against enforcement of the HTM provisions of COPA, committed clear error in misapplying the law, and made clear misjudgments of fact in considering the proof, when it concluded that:

(1) Plaintiffs had established substantial likelihood of prevailing on a claim that COPA, as to HTM, was not narrowly tailored to achieve the Government's compelling interest and therefore failed a strict scrutiny test under the First Amendment, 322 F.3d at 251, 265-66, 271; and that

(2) Plaintiffs had established a substantial likelihood of prevailing on a claim that COPA, as to HTM, was unconstitutionally overbroad, 322 F.3d at 251, 266-67, 271.

The Court of Appeals likewise committed clear error in misinterpreting the law, and committed clear mistake in considering the proof, in each of its six substantive holdings. The court below was wrong in the following findings:

(1) that COPA's definition of "material that is harmful to minors", 47 U.S.C. § 231(e), was not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful pornography and therefore failed strict scrutiny under the First Amendment, 322 F.3d at 251-55, 267-68. The courts below should have fulfilled their obligations to find that COPA adopted the constitutionally proper test of "HTM", which is a "legal term of art" for pornography that is Obscene For Minors. To the extent that the courts below believed they could conclude that any part of the test was unclear or capable of overbreadth, the courts had the power and the duty to authoritatively construe the Act so as to clarify any perceived vagueness and narrow any perceived potential for overbroad applications; and

(2) that the definition of "commercial purposes", § 231(a)(1), was not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful pornography and therefore failed a strict scrutiny test, 322 F.3d at 251, 256-57, 269. COPA limits the reach of the statute to those "engaged in the business" of selling pornography that is at least obscene for minors. The courts below erroneously read the Act so broadly that they wrongly included Web publishers who have posted any material that involved nudity or sexual information on their Websites,

even if *non-prurient* or *not patently offensive within the meaning of the statute*[14], and even if they did not try to make a profit from such material or did not post such material as a principal business purpose, and then concluded that the Act, as thus read, subjected too wide a range of Web publishers to potentially improper liability. [15] This error can be avoided

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[14] The hypothetical "examples" given by the Circuit, 322 F.3d at 267-68, *do not meet the substantive requirements* of the HTM test set forth in COPA. The Third Circuit's interpretive error, 322 F.3d at 267-68, regarding what constitutes HTM under COPA's definition, is analogous to the error in *Jenkins v. Georgia*, 418 U.S. 153 (1974), where the movie *Carnal Knowledge* did not meet the definitional elements of the obscenity test of *Miller, supra,* 413 U.S. at 24-25, because it did not actually depict sexual conduct. Offensive implication is not enough. Under COPA, no one can be subject to prosecution for the distribution of materials that do not depict or describe specified sexual acts, in a way that average adults would find prurient and patently offensive with respect to minors and a reasonable adult would find lacking serious value for minors. § 231(e)(6)(A)-(C).

[15] In an appropriate case it would be conceptually possible to charge a website operator with the maintenance of a Website, which, taken as a whole, is HTM. However, the Third Circuit wrongly asserted that every obscenity-related HTM prosecution involving matter disseminated via Websites must always include an attack on the "entirety of the website." This proposition is without merit, and must be rejected. On one hand, the court argues that whether one image is HTM can be judged only in relation to its context of distribution (the Website) (which is a true statement). The court then wrongly extrapolates (without justification) that this requires that no individual data file available for dissemination at a website can be declared HTM without first finding that the *entire* Website is HTM (which is an untrue statement). Under the interpretation suggested by the Third Circuit, to avoid prosecution under COPA, defendants would only have to "post" volumes of innocuous, unrelated material in order to use their "website" as a "shield" against prosecution, by arguing that the prosecution must establish that *all* of the thousands of

by courts properly applying and interpreting COPA, as Congress intended, as applicable only to commercial Websites knowingly engaged in the business of attempting to profit from adult pornography that is Obscene or Obscene For Minors and knowingly making such pornography available to minors; and

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electronic data files (posted and made accessible to the public at the same Website) are HTM. *See Miller v. California*, 413 U.S. at 25, n. 7, where the Court, in rejecting as a constitutional standard the "utterly without redeeming social value test" of *Memoirs v. Massachusetts*, 383 U.S. at 419, stated: "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. . . ." Citing *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). *See, also, Penthouse International v. McAuliffe*, 702 F.2d 925 (11th Cir. 1983) (insertion of obscene photographs between the pages of the Bible was insufficient to save the work from being found obscene); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984) (obscene pictures attached to a political letter still fall into the category of obscene work); *Flying Eagle Publications v. United States*, 285 F.2d 307 (1st Cir. 1961) (a bucolic account of a Sunday school picnic did not save sexually graphic pictures of a Roman orgy from being declared obscene).

In a prosecution under COPA, the named defendants -- and not a "website" -- are on trial. The criminal act alleged (with respect to the variable obscenity charge) is the act of the *knowing distribution* to minors of *specifically named material constituting variable obscenity, or HTM.* This Court's obscenity tests, whether for adult obscenity under *Miller* or variable obscenity under *Millerized-Ginsberg*, applies to crimes using computers and online networks, as it does for any other means of transportation or communication and the courts below were wrong to try to exclude "cyberspace" from the reach of federal law. *See Reno v. ACLU,* 521 U.S. 844, at 877, n. 44 (1997) (federal law prohibits the cyberspace transmission of obscene matter); *ApolloMedia Corp. v. Reno,* 19 F.Supp.2d 1081 (N.C. Cal. 1998), *judgment aff'd,* 526 U.S. 1061 (Mem.) (1999) (federal law prohibits transmission of obscene emails); and *United States v. Thomas*, 74 F.3d 701, 707 (6th Cir. 1996), *cert. denied,* 117 S.Ct. 74 (1997).

(3) that the "affirmative defenses" available to Websites under § 231(c)(1) were not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful pornography and failed its strict scrutiny test as a severe burden on adult access to protected speech and failed to provide sufficient freedom from prosecution for innocent Web publishers. 322 F.3d at 251, 257-61, 269-70. The Congressional record is clear that COPA, properly applied as intended, has no application and poses no threat of prosecution for those operators who were not intended by Congress to be subject to the Act. Non-profit, educational, government, media, advocacy, and all other sites that do not regularly sell sexually explicit adult pornography that could meet the traditional legal test for HTM-OFM, do not meet COPA's substantive definition of "prohibited conduct," which definition is limited even further by COPA's adoption of a *non-geographic American adult community "age" standard* for prongs one and two, and the *reasonable adult person standard* for prong three, and was mandated by this Court's cases,[16] and was intended by Congress to avoid misapplications of the Act. With respect to the "affirmative defenses," there is no credible evidence that the Act's technical devices are not available to commercial porn-sites, which already accept credit cards and adult PINs. Based on the record, *see* Joint Stipulation of Uncontested Facts at the preliminary injunction hearing (Joint Exhibit 3), set forth in 31 F.Supp.2d at 481-92, the courts below were wrong in finding that technological screening of users for the purpose of age verification are unreasonable or unavailable to commercial porn-Websites to

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[16] *See* Senate REPORT at 7, 12-13, and House REPORT at 12-13, 27-28, citing *Ginsberg, supra*, *Miller v. California*, 413 U.S. at 24-25 (1973), *Smith v. United States*, 431 U.S. 291, 301-02, 309 (1977), and *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987), as well as *Board of Education v. Pico*, 457 U.S. 853 (1982) and other cases, to limit application of HTM to pornography.

which the Act could properly apply. Under available technology, porn-Websites can request an adult customer to use an adult verification service or other adult information prior to accessing "adult" pornography, or present a credit card for non-charge verification, or, we submit, even enter just a credit card number that passes the free mathematical test of a "Luhn Check Algorithm" under § 231(c)(1)(C);[17] and

(4) that COPA did not employ the "least restrictive means" to effect the Government's compelling interest in protecting minors and therefore failed strict scrutiny. 322 F.3d at 251, 261-66. The lower courts erroneously found that the solitary use of filtering software in the child's own home would be less restrictive, yet a "sufficiently" effective alternative that would protect minors from adult-porn Web commerce. This is patently erroneous, for several reasons:

(a) Filters allow parents some measure of control over their own children's access to speech that parents consider inappropriate (even if not legally HTM), while their children are at home. However, minors don't access the Web *only* on computers located in the child's own home. Minors can gain access through friends, cyber-cafes, wi-fi, and public libraries and schools. In 1998, less than 10% of

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[17] The "Luhn Check Algorithm" is a cheap and instant calculation that math-checks a number to verify that it is of the type that is issued by credit card financial institutions, even though no merchant account or bank referral need be involved. Such a "Luhn Check" would prevent minors from making-up a number and trying to pass it off on a porn-site. A "Luhn Check" would screen out all but "a few of the most enterprising and disobedient young people", as noted in *Sable Communications of Cal. v. FCC*, 429 U.S. 115, 130 (1989). The propriety of the "Luhn Check Algorithm" as a defense to COPA was discussed in the BRIEF OF MEMBERS OF CONGRESS filed below in the District Court (BRIEF at pp. 32-36) and Court of Appeals on first review (at 4, 24).

libraries used filters at all.[18] In 2002, one-quarter of libraries filtered all access for minors.[19]

(b) Parents cannot supervise all the ways their children access the Web in today's world. In addition, notebook computers have become essential tools for students and are operated outside of the supervising presence of parents and can obtain wireless access to the Web, Internet, and other networks from almost anywhere.

(c) COPA is entitled to be judged on its own merits as to the protection it offers minor children across all social boundaries and in all Web traffic. It is improper to substitute a less restrictive and less effective alternative for the legislative judgment involved in the Congressional choice of remedy, since this Act can be read constitutionally. The decisions below could also be found to violate the Separation of Powers doctrine. Congress exercised its legislative power in adopting COPA, with the limitations set out in the House REPORT, as a legitimate governmental response to a grave social problem; and

(5) that COPA is substantially overbroad in placing significant burdens on Web publishers' communication of speech that may be protected as to adults and adults' ability to access such speech and, in so doing, the Act encroached upon a significant amount of protected speech beyond that which the Government could target constitutionally in preventing children's exposure to material that is obscene for minors. 322 F.3d at 251, 266-70. The courts below failed to apply existing obscenity jurisprudence from this Court's

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[18] *See* National Commission on Libraries and Information Science: *1998 National Survey of Public Library Internet Connectivity* (www.nclis.gov/statsurv/1998plo.pdf).

[19] *Public Libraries and the Internet 2002: Internet Connectivity and Networked Services* (www.ii.fsu.edu/projects/2002pli/2002.plinternet.study.pdf).

binding and applicable precedent as a constructive limitation on the reach of the Act to any such perceived protected speech, which they could and should have done to protect all such speech from any possible perceived threat. There was no reasonable basis for the Court of Appeals to conclude that COPA's: (a) definition of "material harmful to minors" impermissibly placed at risk a wide spectrum of speech that was constitutionally protected in this context; (b) definition of "minor" broadened the reach of "material that is harmful to minors" under the statute to encompass a vast array of speech that was protected for adults; (c) purported limitation of liability to persons making communications "for commercial purposes" subjected too wide a range of Web publishers to potential liability; and (d) application of "community standards" (as erroneously understood by the court) exacerbated the problem by improperly widening an unintended spectrum of speech within reach of the law; and

(6) that COPA was not "readily susceptible" to a narrowing construction, so as to save it from being overbroad. 322 F.3d at 255, 270-71. The federal courts have the absolute duty and power to authoritatively construe federal statutes, either facially or as applied to factual circumstances on a case-by-case basis, as this Court recognized even as to this Court in *Ferber, supra*.

This Court shares the duty to authoritatively construe this federal statute, if a serious doubt of constitutionality is raised and a construction of the statute is needed so any questions may be avoided. The Third Circuit has twice evaded its obligation to judicially construe COPA so as to save it. Therefore, this Court should reverse the decision of the Court of Appeals, reverse the judgment of the District Court, and vacate the Preliminary Injunction issued as having been improvidently granted, and render instead a narrowing authoritative judicial construction of COPA, consistent with its legislative purpose and Congressional intent, which furthers the policy of federal statutory

construction that federal courts should give federal legislation a saving construction in order to avoid constitutional conflicts and insure the application of the law within valid parameters.

II. COPA IS A VALID CONGRESSIONAL EXERCISE OF LEGISLATIVE POWER DIRECTED AT MITIGATING THE SEVERITY OF A *KNOWN PROBLEM* WITH RESPECT TO THE INDISCRIMINATE DISSEMINATION BY COMMERCIAL VENDORS OF "OBSCENE" WORLD WIDE WEB PORNOGRAPHY TO MINORS.

While the World Wide Web is a powerful learning tool for children, it also poses substantial dangers to young people at the hands of unscrupulous individuals. Aggressive or fraudulent "bait and switch" cyberporn marketing practices on the World Wide Web can make it impossible for children to avoid confrontation with pornographic images.

See, for example, the National Center for Missing & Exploited Children, *Online Victimization: A Report on the Nation's Youth*, www.missingkids.org/download/nc62.pdf. This was a survey of 1,501 Youths who were regular Internet users (including the World Wide Web), and was commissioned by Congress. The survey shows that teenagers are a primary vulnerable population. According to this report: (1) one in five admitted receiving an online sexual solicitation; (2) one in thirty-three admitted to an aggressive sexual solicitation -- a solicitor who asked to meet them somewhere; called them on the telephone; sent them regular mail, money, or gifts; (3) one in four admitted to an unwanted exposure to pictures of naked people or people having sex; (4) one in seventeen admitted being threatened or harassed; (5) one quarter of these young people admitted to being distressed by these incidents. It is obvious that our children and grandchildren are suffering through a serious

amount of problems and harm caused by pornographers and pedophiles in order to make use of the Internet and Web.

The deterrent value of imposing criminal sanctions on the indiscriminate dissemination of HTM to minors by commercial pornography vendors is substantial. No amount of "training" or "user based" remedies can adequately protect minors from falling prey to the surreptitious ploys of adults.

Minor children are exposed to pornography on the World Wide Web under many circumstances, such as:[20]:

1. Stealth-sites and misleading URLs: many porn-Websites intentionally mimic names of well-known companies, agencies, personalities, or brand names, in order to lure the unwary or tease a potentially broader audience.

2. Page-Jacking: the use of meta-tags (words in Website headers to attract search engines to a site) for unrelated, innocent site searches or copying the legitimate Web pages of others and adding a redirect script to draw traffic to pornsites having no relevance to the desired original site.

3. Mouse-traps: visitors are trapped in an endless pornographic maze, through the use of a software program that adds scripts to the pages containing porn ads which cause more porn ad pages to be displayed when the user clicks the browser's back or close buttons, making it impossible to leave the pornographic sites.

4. Innocent, Imprecise, and Misdirected Searches: innocent word searches on search engines lead unsuspecting users to numerous porn sites. For example, words such as

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[20] *See* www.ProtectKids.com; and House REPORT at 10-11, Senate REPORT at 2-4. *See also* CONG. REC.-SENATE, S. 12146-54 (daily ed., November 8, 1997), Sponsor's Floor Statement on COPA, by Senator Coats; and HEARING ON LEGISLATIVE PROPOSALS TO PROTECT CHILDREN FROM INAPPROPRIATE MATERIALS ON THE INTERNET ("HOUSE HEARING on COPA") House Committee on Commerce, 105th Cong., 2d Sess. (September 11, 1998).

"girls," "boys," "toys," "bambi," "doggy," and "dolls" all lead to pornographic sites.

5. Unsolicited e-mail: push-shove commercial email messages regularly contain pornography or links to pornsites on the Web ("porn-spam"), often with deceptive subject lines to trick recipients into opening the mail or containing scripts that open automatically or which display porn pictures without even clicking on a link.

6. Cyber-squatting and Porn-napping: Web domain names that are pre-registered on speculation that it can be sold or that have been "hijacked" and "held ransom" by pornographers, as domain names expire, are neglected to be renewed, or abandoned (such as sites for missing children, schools, clubs, or for former products of major companies). This problem is exacerbated and results in unintentional links to pornography, when other unsuspecting entities provide "links" to a "hijacked" URL, formerly held by a legitimate entity -- but now owned by a pornographer.[21]

III. COPA SHOULD NOT HAVE BEEN SUBJECTED TO STRICT SCRUTINY AND SHOULD BE UPHELD UNDER AN INTERMEDIATE LEVEL OF REVIEW, BUT CAN MEET EITHER LEVEL OF SCRUTINY, IN ANY EVENT.

COPA as a narrow statute, applies (1) only to pornography displayed on the World Wide Web and (2) only to communications made for commercial profit.[22] COPA "channels" (but does not "ban") commercial material (as opposed to expressive speech) to an adult audience, and is based upon a number of legitimate governmental goals. COPA should be subject to "intermediate scrutiny," under

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[21] *See also* Online Internet Institute, www.oii.org.

[22] Senate REPORT at 7-8, 10; House REPORT at 6-7, 12-13, 15-16.

the *Central Hudson* test[23] for commercial speech, and not "strict scrutiny." COPA is "viewpoint neutral," regulating dissemination of specifically defined subject matter, regardless of the identity or perceived viewpoint of the speaker, and thus, does not present the danger of "viewpoint discrimination" that might require strict scrutiny.[24]

COPA is not more extensive than necessary to serve and directly advance the many substantial governmental interests involved and may be subject to intermediate scrutiny. There is no indication that anything short of criminal penalties (under COPA) will be effective in deterring the described notorious, unprotected commercial practices of pornsites on the World Wide Web.[25]

IV. COPA IS NOT SUBSTANTIALLY OVERBROAD.

For First Amendment overbreadth, a plaintiff may assert rights of others only when a statute is facially and substantially overbroad and the improper applications of the law are not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*

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[23] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561-66 (1980).

[24] *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 538, 554-55 (2001) (applying *Central Hudson* test to public advertising regulations). COPA regulates the placement of a commercial product for reasons unrelated to the communication of ideas. *See United States v. O'Brien*, 391 U.S. 367 (1968); *Erie v. Pap's A.M.*, 529 U.S. 277, 289-96 (2000); *Texas v. Johnson*, 491 U.S. 397, 403 (1989). The electronic blinders are only to shield its view from minor children under 17. The regulatory obligations leave many adequate and readily available "alternative avenues of communication" in and out of this medium. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986).

[25] For discussions of open dissemination of "free porn teasers," *see*: www.ProtectKids.com, www.ftc.gov, www.oii.org.

v. Oklahoma, 413 U.S. 601, 611-15 (1973). This is an intentionally heavy burden to establish. Plaintiffs must plead and prove the substantial overbreadth of the statute as a whole. *See Broadrick, id., and New York v. Ferber*, 458 U.S. at 769-74. *See also Watson v. Buck*, 313 U.S. 387, 400-03 (1941),[26] and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 485 (1989).

The duty of federal courts to authoritatively construe federal statutes so as to save them was stated clearly in *Ferber*, 458 U. S. at 769, n. 24:

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to a limiting construction.

The scope of COPA was carefully limited to avoid the overbreadth found in the indecency provisions of the CDA, examined in *Reno v. ACLU*.[27] As this Court noted in the instant case on the first appeal:

> First, while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applies only to

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[26] Noting: "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. ... To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." In order for federal court to strike a state statute, it must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

[27] 521 U.S. 844 (1997) (holding that the Internet is like a "print" medium, upholding CDA's obscenity provisions, but striking other provisions that were interpreted to define "indecency" using "broadcast medium" standards).

> material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communications made "for commercial purposes." [footnote omitted] *Ibid.* And third, while the CDA prohibited "indecent" and "patently offensive" communications, COPA restricts only the narrower category of "material that is harmful to minors." *Ibid.* [28]

Based on the facts of this record, COPA does not apply to Plaintiffs. However, COPA can and should be constitutionally applied to commercial vendors of pornography, who voluntarily choose to use the World Wide Web to regularly sell that described matter and also knowingly make it available to minors.

Because Plaintiffs: (1) have failed to establish that COPA is "substantially overbroad," and (2) cannot show that COPA applies to them, Plaintiffs lack the requisite standing to request and receive injunctive relief under Article III of the Constitution. Plaintiffs have suffered no "injury-in-fact." Facts supporting Article III jurisdiction must appear "affirmatively from the record." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230 (1990). Plaintiffs' unsubstantiated "fear" is too speculative to invoke jurisdiction, as is interference with an Internet "flow" experience or a general interest in stopping enforcement of laws affecting online pornography. Plaintiffs lack the requisite "direct stake in the outcome". *Valley Forge College v. Americans United*, 454 U.S. 464, 473 (1982). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997): "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do."

This lawsuit has not been brought by commercial pornographers, to whom the statute could validly apply—and constitutionally so, if the Act were evaluated as intended by

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[28] *Ashcroft v. ACLU*, 535 U.S. 564, 569-70 (2002).

Congress. Instead, Plaintiffs are entities (based upon the record) expressing non-pornographic sexual content that has never been alleged or found or accused of being "harmful to minors" as obscene or obscene for minors or otherwise falling within COPA's proper scope or legitimate reach.

The text of the operative provisions of COPA clearly demonstrates that COPA does not regulate Web sites that merely contain material that is sexual in nature. COPA narrowly and specifically applies channeling obligations only on commercial Web sites that regularly engage in the business of selling, and then knowingly make available to minors, that type of pornography that meets the *Millerized-Ginsberg* definition in Section 231(e)(6) that is obscene or obscene for minors. As such, this two-part burden of proof on the Government, like that under 18 U.S.C. § 1466,[29] would require a federal jury and the federal courts to find that an offender of COPA regularly sold pornography that was obscene or obscene for minors and then made available specific pornographic material that is obscene for minors under the definition of what is "harmful to minors". None of the Plaintiffs have pleaded or proven, or claimed or argued, that any of them has ever sold or engaged in the business of profiting from pornography meeting the proper test for obscenity or obscenity for minors. The Government has not claimed, and explicitly rejected any claim, that Plaintiffs have any such obscenity or have in any way come under the reach of COPA. Finally, the District Court did not find any of Plaintiffs' materials to be pornographic, much less even arguably within the proper scope of the statutory tests for obscenity or obscenity for minors, or that any Plaintiff has ever caused himself or itself to come within the intended and legitimate reach of the Act. Therefore, the record is devoid

[29] Congress intended COPA's 47 U.S.C. § 231(e)(2) to parallel 18 U.S.C. § 1466, as stated in S. REPT. No. 105-225, at 11, and H.R. REPT. No. 105-775, at 27.

of any factual basis for a case or controversy as to the validity of COPA as to these Plaintiffs and there is no standing shown for any Plaintiff.

By specific statutory definition, COPA does not apply to materials that have serious literary, artistic, political, or scientific value for minors, and therefore COPA cannot apply to serious or controversial treatments of sex, such as serious sex education, AIDS or STD information, disease prevention, sexual politics, news accounts of sexual offenses or legal issues, and political or social treatments of sexual issues. Properly construed, COPA cannot reach any such protected speech and Websites displaying such protected materials have no duties to exclude minors under this Act.

COPA requires that an offender know the character of the matter and then knowingly make, for commercial purposes, a communication comprised of specific, statutorily defined material. Offenders must be "engaged in the business" of trying to profit from such pornographic communications "as a regular course of such person's trade or business" under § 231(e)(2). COPA does not apply to private, governmental, news, non-profit, or other sites that do not regularly market such statutorily defined material. Properly construed, even secondary transmissions ("hot links" to offending sites), standing alone, would not violate COPA, even if "commercial." House REPORT at 25.

There has been no showing of "irreparable harm" or even "risk" of irreparable harm.[30] "Self-censorship" does not constitute irreparable harm.[31] For this reason, the

[30] Even some "risk of harm" is insufficient for the harsh remedy of a preliminary injunction. *See Hohe v. Casey*, 868 F.2d 69, 72 (3rd Cir. 1989): "[E]stablishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.'"

[31] *See Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989): "But deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized

conclusion of the District Court, repeated by the Court of Appeals,[32] that "plaintiffs could reasonably fear prosecution because their Web sites contained material 'that is sexual in nature'" is unfounded, hypothetical, and clear error.[33]

CONCLUSION

In addressing the problem of children's access to "teasers, free sexually explicit images and animated graphic images files designed to entice a user to pay a fee to browse

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the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.' ... The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents."

[32] *See* 217 F.3d 162, 171.

[33] COPA only applies to subject matter meeting the 3-pronged *Millerized-Ginsberg* test, as adapted by Congress to the commercial Web-based pornography trade. Not only must the pornography depict a sexual act, contact, or lewd genital or breast exhibition, it must be obscene or obscene for minors in that it: (1) as a whole, appeals to prurient interest with respect to minors, and (2) with respect to what is offensive for minors, be patently offensive in the manner in which it represents the specific sexual conduct, and (3) lack serious literary, artistic, political, or scientific value for minors. The first two prongs, under *Miller-Smith* and Congressional intent, are to be judged by the average adult, applying contemporary standards of the American adult community as a whole with respect to what is obscene for minors, and the third prong, under *Pope*, is judged by a "reasonable person" making a universal judgment of value for the age group of probable recipient minors to which the pornography was knowingly made available by a commercial Web site that regularly sells obscenity or variable obscenity. *See* House REPORT at 28; and BRIEF OF MEMBERS OF CONGRESS to this Court on prior appeal, *Ashcroft v. ACLU*, No. 00-1293, at 4-12.

the whole" of pornography sites,[34] COPA adopts the specific requirements of the *Millerized-Ginsberg* test and is supported by *Paris Adult Theatre, 12 200-Ft. Reels, Thirty-seven Photographs, supra*, as well as *Miller, Smith, and Pope, supra*, and the legislative intent of Congress. The Act deserves to be and should now be upheld.

The "public good" is not served by enjoining a federal statute that is capable of constitutional application. The preliminary injunction, issued wrongly, thwarts the legislative authority of Congress to protect children and the manner in which carriers of communication are used to transact business affecting Interstate Commerce. The lower federal courts' balancing of interests and "potential harm" to parties was in error.

Your *amici* respectfully submit that, instead of effectuating the intent of Congress, the courts below improperly widened the "possibly invalid" reach of COPA in order to issue and uphold the preliminary injunction, and improperly gave COPA an arbitrary and expansive construction, in violation of clearly binding precedents regarding statutory construction. In direct contravention to the mandate of *Ferber*, *supra*, 458 U.S. at 769, n. 24, the lower federal courts interpreted COPA to reach potentially protected speech and, thus, made it unconstitutionally overbroad, rather than narrowly and authoritatively construing the Act within constitutional parameters under controlling precedent for "variable obscenity" and eliminating both potential overbreadth and any arguable vagueness. This Court has a duty to and should correct this error and authoritatively construe COPA as constitutionally appropriate and proper under the governing principles.

The preliminary injunction is contrary to the public interest. Without evidentiary support, it restrains a valid Act of Congress and inequitably permits the legitimate target of

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[34] *ACLU v. Reno*, 31 F.Supp.2d 473, 478 (E.D. Pa. 1999).

COPA (*i.e.* commercial pornographers) to continue to disseminate to minors material that is "harmful" because it is obscene as to minors. This raises serious social and law enforcement concerns.

COPA represents the legitimate and authoritative judgment of Congress that the power of additional criminal laws at the federal level is necessary. COPA vindicates the interest that society has in deterring and punishing anti-social commercial behaviors that harm children and which negatively affect communications channels and Interstate Commerce.

For all these reasons, the judgment of the Court of Appeals in affirming the preliminary injunction should be reversed and a narrowing authoritative construction be adopted by this Court that is binding on the lower courts in order to allow COPA to be applied in a valid and constitutional fashion as intended by the Congress.

December 10, 2003

Respectfully submitted,

Carol A. Clancy
Counsel of Record
Bruce A. Taylor
Co-Counsel
Attorneys for *Amici Curiae*

APPENDIX

TEXT OF OPERATIVE PROVISIONS OF COPA, THE CHILD ONLINE PROTECTION ACT

Title 47, United States Code.

Section 231. RESTRICTION OF ACCESS BY MINORS TO MATERIALS COMMERCIALLY DISTRIBUTED BY MEANS OF WORLD WIDE WEB THAT ARE HARMFUL TO MINORS.

(a) REQUIREMENT TO RESTRICT ACCESS.—

(1) PROHIBITED CONDUCT. –Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

* * *

(c) AFFIRMATIVE DEFENSE.—

(1) DEFENSE.—It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

* * *

(e) DEFINITIONS.—For purposes of this subsection, the following definitions shall apply:

* * *

(2) COMMERCIAL PURPOSES; ENGAGED IN THE BUSINESS.—

(A) COMMERCIAL PURPOSES.—A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) ENGAGED IN THE BUSINESS.—The term `engaged in the business' means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or

knowingly solicits such material to be posted on the World Wide Web.

* * *

(6) MATERIAL THAT IS HARMFUL TO MINORS.--The term `material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) MINOR.—The term `minor' means any person under 17 years of age.

CERTIFICATE OF SERVICE

Three copies of this Brief of Members of Congress as *Amici Curiae* were served upon the attorneys for the parties by deposit in the U.S. Mails, first-class postage prepaid, (and immediate copies sent by fax and email) on the 10th day of December, 2003, addressed to:

Hon. Theodore B. Olson
Solicitor General
Edwin S. Kneedler, Esq.
Deputy Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2201
Fax: 202-514-8844

Attorneys for Petitioner

Ann Beeson, Esq.
Christopher Hansen, Esq.
ACLU Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
Fax: 212-549-2651

Attorneys for Respondents

All parties required to be served have been served.

So certified,
Bruce A. Taylor
Attorney for *Amici Curiae*

Bruce A. Taylor, President & Chief Counsel
Carol A. Clancy, Senior Counsel
National Law Center for Children and Families
3819 Plaza Drive
Fairfax, VA 22030-2512
(703) 691-4626, Fax: 703-691-4669
BruceTaylor@NationalLawCenter.org
CClancy@NationalLawCenter.org

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